

U.S. Department of Labor

Benefits Review Board
200 Constitution Ave. NW
Washington, DC 20210-0001



BRB No. 20-0002

LEO WILSON)	
)	
Claimant-Respondent)	
)	
v.)	
)	
WILMINGTON SHIPPING)	
COMPANY/AVITUS, INCORPORATED)	DATE ISSUED: 02/26/2020
d/b/a AVITUS GROUP)	
)	
and)	
)	
ZURICH AMERICAN INSURANCE)	
COMPANY)	
)	
Employer/Carrier-)	
Petitioners)	DECISION and ORDER

Appeal of the Order (1) Partially Granting Motion for Summary Decision and (2) Denying Motion for Expedited Hearing of Paul C. Johnson, Jr., Administrative Law Judge, United States Department of Labor.

Andrew Hanley (Crossley, McIntosh, Collier, Hanley & Edes, P.L.L.C.), Wilmington, North Carolina, for claimant.

Debra L. Doby (Goldberg Segalla LLP), White Plains, New York, for employer/carrier.

Before: BOGGS, Chief Administrative Appeals Judge, GRESH and JONES, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Order (1) Partially Granting Motion for Summary Decision and (2) Denying Motion for Expedited Hearing (2019-LHC-00392) of Administrative Law Judge Paul C. Johnson, Jr., rendered on a claim filed pursuant to the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §901 *et seq.* (the Act). We will review the administrative law judge's Order for abuse of discretion and compliance with law. *Newport News Shipbuilding & Dry Dock Co. v. Holiday*, 591 F.3d 219, 43 BRBS 67(CRT) (4th Cir. 2009).

Claimant injured his right forearm while working for employer as a line handler on July 20, 2018. Employer accepted the claim and began paying claimant temporary total disability benefits under North Carolina's workers' compensation statute. On October 1, 2018, claimant filed a claim for benefits under the Act, alleging an injury to his right forearm, as well as injuries to his back, legs, and right shoulder. The case was forwarded to the Office of Administrative Law Judges (OALJ), where claimant moved for summary decision on the issues of whether the injury to his forearm is covered under the Act and average weekly wage. In response, employer conceded claimant's forearm injury is covered under the Act but averred that genuine issues of material fact remain concerning the calculation of claimant's average weekly wage. Claimant filed a reply in support of his motion.

The administrative law judge granted the motion for summary decision on the issue of coverage for claimant's arm injury, but denied it on the average weekly wage issue. As part of the "coverage" issue raised, the administrative law judge stated claimant also sought summary decision on the issue of whether his back, leg, and shoulder injuries "arose in the course of his maritime employment." Order at 2. He stated that claimant's motion was supported by his own affidavit that these injuries occurred in the incident in which his forearm was injured and employer did not refute this contention. *Id.* Thus, the administrative law judge granted summary decision in claimant's favor on the issue of whether his back, leg and shoulder injuries are covered under the Act. In addition, the administrative law judge set the date for a formal hearing solely on the issue of claimant's average weekly wage. *Id.*

On appeal, employer challenges the administrative law judge's grant of summary decision on the issue of coverage for claimant's alleged back, leg and shoulder injuries. In response, claimant filed a Motion to Dismiss employer's appeal as interlocutory. Employer

responds that the Board should address its interlocutory appeal in order to direct the course of the adjudicatory process.¹

Employer appealed a non-final or interlocutory order, as the administrative law judge neither awarded nor denied benefits to claimant in his order. *See* 33 U.S.C. §919(e); 20 C.F.R. §702.348; *see generally* *Gupton v. Newport News Shipbuilding & Dry Dock Co.*, 33 BRBS 94 (1999). The Board is not bound by formal rules of procedure, 33 U.S.C. §923(a), and may decide interlocutory appeals when the order appealed is a “collateral order,” it is in the interest of judicial efficiency to do so, or if it is necessary for the Board to direct the course of the adjudicatory process. *See, e.g., L.D. [Dale] v. Northrop Grumman Ship Systems, Inc.*, 42 BRBS 1, *recon. denied*, 42 BRBS 46 (2008); *Baroumes v. Eagle Marine Services*, 23 BRBS 80 (1989). We will decide employer’s appeal in this case in order to properly direct the course of the adjudicatory process. *See Pensado v. L-3 Communications Corp.*, 48 BRBS 37 (2014). Therefore, we deny claimant’s motion to dismiss.

In his May 13, 2019 Motion for Summary Judgment, claimant moved the administrative law judge to grant “summary judgement . . . resolving two issues for hearing – coverage and compensation.” Cl. Mot. for Sum. Jud. at 4. Claimant’s purpose in filing this motion was to obtain from the administrative law judge “an Order requiring the carrier to provide compensation and medical benefits under the Longshore Act.” Cl. Reply at 2. Claimant averred he was covered by the Act’s status and situs provisions, 33 U.S.C. §§902(3), 903(a), at the time of the accident that caused his forearm injury, noting however that “the carrier contests that Mr. Wilson injured his back, legs or shoulder when he was violently dragged by the line” in the accident.” Cl. Mot. for Sum. Jud. at 2. Employer conceded the accident occurred within the Act’s coverage provisions and the compensability of the forearm injury, Emp. Resp. at 2, but disputed the allegations of additional injuries on the basis “of lack of prima facie medical evidence.” *Id.* Despite noting the unclear nature of claimant’s motion for summary decision, the administrative law judge found claimant was seeking a finding that the injuries to his back, legs, and shoulder also arose in the course of maritime employment. Order at 2. Because employer did not “refute” claimant’s affidavit that these injuries occurred in the accident, the administrative law judge found they “are also covered under the Act.” Order at 2.

We vacate this finding to the extent the administrative law judge found claimant injured his back, legs and shoulder in the covered work accident. In determining whether

¹We affirm the administrative law judge’s denial of claimant’s request for an expedited hearing as it is unchallenged on appeal. *Scalio v. Ceres Marine Terminals, Inc.*, 41 BRBS 57 (2007).

to grant a motion for summary decision, the fact-finder must determine, after reviewing the evidence in the light most favorable to the non-moving party, whether there are any genuine issues of material fact and whether the moving party is entitled to summary decision as a matter of law. *Wilson v. Boeing Co.*, 52 BRBS 7 (2018); *Walker v. Todd Pacific Shipyards*, 47 BRBS 11 (2013), *vacating in part on recon.*, 46 BRBS 57 (2012); *Morgan v. Cascade General, Inc.*, 40 BRBS 9 (2006); 29 C.F.R. §18.72. Both parties expressly noted there was not agreement on issues of fact concerning the alleged back, leg and shoulder injuries. Cl. Mot. for Sum. Jud. at 2; Emp. Resp. at 2. Moreover, a careful reading of claimant's statement of the "Uncontested Medical Facts" in his Motion for Summary Judgment reveals the uncontested medical facts, as claimant submitted, relate solely to Mr. Wilson's right arm. Cl. Mot. for Sum. Jud. at 2. In moving for summary decision, a party must sufficiently identify each claim, or the part of each claim, on which summary decision is sought in order to provide the non-moving party with appropriate notice and the opportunity to be heard. 29 C.F.R. §§18.72(a), 18.72(c)(1); *see generally Goldberg v. Kelly*, 397 U.S. 254 (1970). No such notice occurred in this case. Rather, as the administrative law judge found, claimant "has not clearly stated what he means." Order at 2. As a matter of law because there was not proper notice to employer of any issue with respect to the other alleged injuries, and issues of material fact remain as to those alleged injuries, claimant is not entitled to a finding in his favor. *Dunn v. Lockheed Martin Corp.*, 33 BRBS 204 (1999). We, therefore, vacate the administrative law judge's summary decision on this issue. If issues concerning these injuries remain in dispute, any party is entitled to an evidentiary hearing addressing them.² 33 U.S.C. §919(d); *Morgan*, 40 BRBS at 13; 20 C.F.R. §702.331 *et seq.*

²In his motion, claimant noted the "remaining issues raised by [employer] can presumably be heard at the hearing in the future." Cl. Mot. for Sum. Jud. at 4. On December 23, 2019, the administrative law judge canceled a hearing scheduled for March 10, 2020, and set a schedule for submission of evidence and briefs on the average weekly wage issue.

Accordingly, we deny claimant's motion to dismiss. We vacate the administrative law judge's grant of summary decision on issues concerning claimant's alleged injuries to his back, legs and shoulder and remand the case for further appropriate action.

SO ORDERED.

JUDITH S. BOGGS, Chief
Administrative Appeals Judge

DANIEL T. GRESH
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge